

RUSSELL M. CLAWGES, JR.  
9 Stewart Farm Lane  
Morgantown, WV 26508  
November 12, 2021

Mr. Joseph M. Rucki  
Marshall County Circuit Clerk  
600 7<sup>th</sup> Street, Rm 127  
Moundsville, WV 26041

RE: Axial et al v. National Union et al,  
Civil Action No. 19-C-59  
Business Court Division

Dear Mr. Rucki,

Enclosed please find an Order in the above-referenced civil action. Please see that this order is entered and attested copies sent to the parties' counsel. Your cooperation and attention to this matter are appreciated.

Very truly yours,



Russell M. Clawges, Jr.  
Discovery Commissioner

FILED  
2021 NOV 15 AM 10:41  
JOSEPH M. RUCKI

**IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

AXIAL CORPORATION and  
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.; ALLIANZ  
GLOBAL RISKS US INSURANCE COMPANY;  
ACE AMERICAN INSURANCE COMPANY;  
ZURICH AMERICAN INSURANCE COMPANY;  
GREAT LAKES INSURANCE SE; XL  
INSURANCE AMERICA, INC.; GENERAL  
SECURITY INDEMNITY COMPANY OF  
ARIZONA; ASPEN INSURANCE UK LIMITED;  
NAVIGATORS MANAGEMENT  
COMPANY, INC.; IRONSHORE SPECIALTY  
INSURANCE COMPANY; VALIDUS  
SPECIALTY UNDERWRITING SERVICES,  
INC.; and HDI-GERLING AMERICA  
INSURANCE COMPANY,

Defendants.

JOSEPH M. RUCK

2021 NOV 15 AM 10:41

FILED

**Civil Action No. 19-C-59**

**Presiding Judge Christopher C.  
Wilkes**

**Discovery Commissioner:  
Russell M. Clawges, Jr.**

**ORDER DENYING IN PART PLAINTIFFS'  
THIRD MOTION TO COMPEL DISCOVERY**

On a previous day came Defendants National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services Upon full consideration of the issues, the record, and the

pertinent legal authorities, the Discovery Commissioner makes the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

1. This matter involves an insurance coverage dispute concerning a railroad tank car rupture and resulting chlorine release that occurred in August 2016 at Plaintiffs' Natrium plant in Marshall County, West Virginia.

2. Defendants retained counsel on December 19, 2017.

3. Plaintiffs and Defendants are engaged in a discovery dispute concerning certain documents redacted or withheld from production by Defendants. The parties exchanged letters and participated in good faith meet and confer video conferencing concerning 1,111 documents identified in a letter from Plaintiffs' counsel dated March 12, 2021. The parties were unable to resolve the instant discovery dispute over these documents. The parties have not met and conferred over any other documents referenced in Plaintiffs' Motion.

4. On a prior day, Plaintiffs filed Plaintiff's Third Motion to Compel Discovery and their supporting Memorandum, asking the Court to enter an Order compelling discovery.

5. On a prior day, Defendants filed their opposition to Plaintiffs' Third Motion to Compel Discovery.

6. On a prior day, Plaintiffs filed their Reply Memorandum.

7. After a meet and confer and guidance from the Discovery Commissioner, the parties were able to narrow the field of documents in dispute.

8. Thereafter, the Defendants' counsel produced to the Discovery Commissioner on August 31, 2021, a binder containing 26 documents from Exhibit 22 to Plaintiffs' Third Motion to Compel for *in camera* review, as well as a Privilege Log for the documents.



9. Thereafter, the Defendants Counsel produced to the Discovery Commissioner on September 10, 2021, a binder containing 40 documents from Exhibit 22 to Plaintiffs' Third Motion to Compel for in camera review, as well as a Privilege Log for the documents.

10. The Discovery Commissioner thereafter conducted the *in camera* review of the documents provided.

11. The Discovery Commissioner finds that the issues addressed herein are ripe for adjudication.

### **CONCLUSIONS OF LAW**

Under West Virginia law, if the party seeking privileged documents files a motion to compel, or the responding party files a motion for a protective order, the trial court "must then make an independent determination for each communication the responding party seeks to shield from discovery." *State ex rel. Westfield Insurance Co. v. Madden*, 602 S.E.2d 459, 464 (W.Va. 2004) (quoting *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W.Va. 358, 373, 508 S.E.2d 75,90 (1998)). In *State ex rel Westfield*, the Supreme Court of Appeals stated that in situations such as the instant discovery dispute, the court should review the privilege log *in camera* or appoint a special master to review the documents at issue *in camera* to determine whether they are protected from disclosure. *Id* at 465.

Based on the Court's *in camera* review of the materials provided from Exhibit 22 of the Plaintiffs' Third Motion to Compel, the Discovery Commissioner finds that the materials at issue were created for the primary purpose of assisting in pending or probable future litigation by or for a party or party representative and are protected work product and/or protected by the attorney-client privilege. In addition, Plaintiffs have not met the substantial need and undue hardship component of the above-cited rule. Furthermore, Defendants have already produced

numerous documents identified in Plaintiffs' motion and Defendants have also adequately explained their basis for certain redactions that Plaintiffs have challenged. For these reasons, Plaintiffs are not entitled to the relief requested in the motion as to 26 documents provided to the Discovery Commissioner by Defendants' counsel on August 31, 2021 and as to the 40 documents provided to the Discovery Commissioner by Defendants' counsel on September 10, 2021.

In conclusion, after *in camera* review of the produced documents from Exhibit 22 of the Plaintiffs' Third Motion to Compel, the Discovery Commissioner finds the Plaintiffs' are without merit and as such, the Discovery Commissioner DENIES Plaintiffs' Third Motion to Compel as to the documents identified in Exhibit 22 – specifically the 26 documents provided to the Discovery Commissioner by Defendants' counsel on August 31, 2021 and the 40 documents provided to the Discovery Commissioner by Defendants' counsel on September 10, 2021.


### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that the Plaintiff's Third Motion to Compel Discovery is hereby denied as to the 26 documents provided to the Discovery Commissioner by Defendants' counsel on August 31, 2021 and as to the 40 documents provided to the Discovery Commissioner by Defendants' counsel on September 10, 2021 from Exhibit 22 and reviewed *in camera* by the Discovery Commissioner.

IT IS SO ORDERED.

The Discovery Commissioner directs the Circuit Clerk to distribute attested copies of this Order to all counsel of record, to Judge Christopher C. Wilkes at the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, WV 25401 and to Judge Russell M. Clawges, Jr., Discovery Commissioner, at 9 Stewart Farm Lane, Morgantown, WV 26508.

ENTER: November 12, 2021

  
\_\_\_\_\_  
RUSSELL M. CLAWGES, JR.  
DISCOVERY COMMISSIONER